

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al. }  
Plaintiffs, }  
-vs- } Case No. 10 C 5711  
PACKAGING CORPORATION OF } Chicago, Illinois  
AMERICA, et al., } December 13, 2010  
Defendants. }

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MILTON I. SHADUR

11 APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 10 C 5711, Kleen Products versus  
3 Packaging Corporation.

4 MR. MILLER: Good morning, your Honor. Marvin Miller  
5 on behalf of Thule.

6 MS. SWEENEY: Good morning, your Honor. Bonny  
7 Sweeney also on behalf of Plaintiff Thule.

8 MR. MOGIN: Dan Megin, your Honor, on plaintiff of  
9 plaintiff Kleen and the other eight plaintiffs.

10 MR. KANNER: Good morning, your Honor. Steve Kanner  
11 on behalf of Plaintiff Hatco and the remaining plaintiffs.

12 MR. FREED: Your Honor, Michael Freed on behalf of  
13 plaintiff Kleen Products and the other remaining plaintiffs  
14 other than Thule.

15 MR. NICOUD: Good morning, your Honor. Trey Nicoud  
16 on behalf of International Paper, defendant.

17 MS. DIVER: Good morning, your Honor. Jennifer Diver  
18 on behalf of defendant Weyerhaeuser Company.

19 MR. McCAREINS: Good morning, your Honor. Mark  
20 McCareins on behalf of Smurfit-Stone.

21 MR. HERBISON: Good morning, your Honor. Jim  
22 Herbison on behalf of defendant Smurfit-Stone.

23 MR. EIMER: Good morning, Judge. Nate Eimer on  
24 behalf of International Paper.

25 MR. MAROVITZ: Good morning, your Honor. Andy

1 Marovitz for Temple-Inland.

2 MR. FIGLIULO: Good morning. Jim Figliulo on behalf  
3 of Georgia Pacific.

4 MR. MENDEL: Scott Mendel on behalf of Cascades and  
5 Norampac.

6 MR. ECHOLS: Good morning, your Honor. Barack Echoles  
7 on behalf of Packaging Corporation of America.

8 MR. LAYTIN: And Dan Laytin for PCA.

9 THE COURT: Good morning. Let me say at the  
10 beginning, as I thought I had suggested last time, that except  
11 for the fact that we may be dealing at some other points with  
12 substantive matters that affect, for example, defendants on an  
13 individualized basis, I'm really troubled by being confronted  
14 by the troops en masse because I know that -- you know, I used  
15 to practice law, and I know that lawyers like to get paid and  
16 clients are entitled to representation, but I think that  
17 people ought to be exercising some level of judgment in terms  
18 of what we deal with.

19 You know, at this point, I know that the matter that  
20 had been tentatively before the bankruptcy court vanished --

21 MR. FREED: Yes, your Honor.

22 THE COURT: -- completely. I saw the order that was  
23 entered, and as far as I'm concerned, the issue that we really  
24 have before us is the question of representation of the  
25 plaintiff class, something in which the defendants are

1 certainly interested, but I would expect, in candor, that what  
2 you people ought to try to do, when you have something of this  
3 nature on, is to reach some understanding among yourselves  
4 about who would be here as a representative and inform the  
5 others rather than, as I say, showing -- having all the troops  
6 appear -- well, that's really a side issue.

7 Let me address the question that we have.

8 First of all, as you know, the one issue that was  
9 raised had to do with how it was appropriate for counsel for  
10 Thule who had, I thought, made a mistake in judgment, and not  
11 a good one, in terms of dropping Smurfit-Stone, given the  
12 nature of the complaint, and the issue that was raised by the  
13 other competitor for representation is that that doesn't -- I  
14 don't know whether to characterize that as a conflict of  
15 interest because I guess it no longer exists, but they say  
16 that that's something that ought to be considered.

17 I make no ultimate comment on that, and I should also  
18 say at the outset that I am not -- I'm not going to suggest  
19 that we engage in the process that is mistakenly referred to  
20 as somehow bidding as though it were only a money matter in  
21 terms of representation. I'm not going to impose that.

22 I am, however, I think, for purposes of evaluating  
23 what seems to be a pair of submissions on behalf of highly  
24 qualified counsel with a lot of experience in these areas on  
25 plaintiffs' side, I think that there's an added item of

1 information that I ought to have, and it ought to follow the  
2 same kind of pattern that I had set up in situations in which  
3 I had people speaking to the issue of representation, and that  
4 is, I ought to have some indication, which I think could most  
5 appropriately be handled by *in camera* submissions, indicating  
6 the -- a sense of evaluation of the litigation by each of the  
7 putative representatives, representative firms that are  
8 involved here.

9           And as I've frequently commented, lawyers from out of  
10 town probably are not familiar with this, but the late Hu  
11 Will, whom I succeeded, unlike what was it that Jefferson said  
12 when he was congratulated on having replaced Benjamin Franklin  
13 as our minister to France said, "No, I do not replace  
14 Mr. Franklin. I only succeed him," but Hu used to use the  
15 Lloyd's of London approach that I would guess most  
16 practitioners of any age around here are familiar with, and  
17 what it consisted of essentially was the notion that the best  
18 way to evaluate or to try to evaluate a lawsuit -- and this  
19 would be in the context, for example, of efforts at  
20 settlement, but it has a lot of, a lot of echoes otherwise --  
21 is to make a determination as to what the outcome might be if  
22 plaintiffs were totally successful, on which knowledgeable  
23 counsel most often come pretty close on both the plaintiff and  
24 defense side, and then discount that by the sense of the  
25 likelihood of success on which people differ very sharply, but

1 the reason it was called Lloyd's of London approach, of  
2 course, is what it amounted to was what would an insurance  
3 company charge for insuring against the lawsuit, and they  
4 charge a premium that would represent that kind of discount if  
5 you'd take aside the costs that have to do with transaction  
6 costs.

7           Anyway, I would like to have that from both sides,  
8 and also what kind of arrangements each side thought would be  
9 appropriate in terms of fee arrangements, just on -- I  
10 recognize this is kind of a semi-educated guess, but it seems  
11 to me that that's something that is useful for the Court  
12 toward making a determination.

13           For those of you who haven't read comments that I've  
14 made in the bidding process or some of the cases I've dealt  
15 with, including initially an antitrust case, as it happens,  
16 not under the securities, private securities litigation  
17 aspect, you might take a look at a long opinion that the late  
18 Ed Becker, great Judge Ed Becker wrote in the Cendant,  
19 C-E-N-D-A-N-T, litigation, in which he quotes a portion of  
20 what I had said in that and agreed with that conceptually but  
21 said essentially it's a matter of statutory construction that  
22 it did not apply in securities litigation.

23           So it seems to me that I need that supplementation in  
24 order to make a judgment about which of two, as I say, highly  
25 qualified sets of lawyers have put in a pitch for

1 representation.

2 Now, let me just ask each side what's your best  
3 judgment about how long it might take to make that kind of a  
4 submission? And remember, it's not going to be disclosed to  
5 the other side and it's certainly not going to be disclosed to  
6 defendants, although I'll ask them whether any of them sees a  
7 problem with that kind of *in camera* submission.

8 Mr. Freed?

9 MR. FREED: We would be able to do that in a week,  
10 your Honor.

11 MS. SWEENEY: We could probably do it in a week, your  
12 Honor. I think a little more time would be helpful, but if  
13 your Honor wants it in a week, we can do that.

14 THE COURT: Let's say I'll give you until the end of  
15 next week instead. That would be by let's say the 23rd.  
16 That's ten days. I would think that should be sufficient.

17 Now, let me turn, if I may, to plaintiffs -- to  
18 defense counsel.

19 Does any of you see a problem with that kind of *in*  
20 *camera* submission in which I act essentially like the  
21 astronomical black hole, information comes in but nothing goes  
22 out?

23 (Laughter.)

24 MR. NICOUD: Your Honor, Trey Nicoud for  
25 International Paper.

1           Conceptually, we have no issue with that approach and  
2 the -- I guess the only reservation we would express is to the  
3 extent plaintiffs either deliberately or inadvertently use  
4 that as an opportunity to make evidentiary submissions to the  
5 Court. I don't think that's what you're asking.

6           THE COURT: No, I'm not asking for a salesmanship job  
7 in that regard, of course; and even if there were one made, I  
8 wouldn't -- I wouldn't -- I would not only not put it in the  
9 bank, but I wouldn't really give any particular credence to  
10 it. After all, I'm a stranger to the dispute. All I know is  
11 what I have seen in the consolidated complaint, and I'm  
12 certainly not going to credit any kind of advocacy aspect of  
13 that.

14           MR. NICOUD: That would be our only concern.

15           THE COURT: Anybody else see a problem with that?

16           Okay. Then if we have it on the 23rd, I know I've  
17 been inflicting pain and suffering on some of my staff here by  
18 setting stuff in that next week, and I'm not going to do it  
19 here, which I know is going to relieve Sandy somewhat anyway.

20           Suppose I put it into maybe the first week after -- I  
21 can do it either in the first week after January 1st or the  
22 second week, but I would have to be doing it at an 8:45 time  
23 because most of the days are pretty well set for 9:00 o'clock.

24           Sandy, tell me which of the days -- let's start with  
25 maybe the 6th and -- the 6th through the 14th.

1           THE CLERK: As far as an 8:45?

2           THE COURT: 8:45, yeah.

3           THE CLERK: The 6th and the 7th, I think, are okay.

4           THE COURT: The 6th, 7th, right?

5           THE CLERK: Uh-huh, or the 14th.

6           THE COURT: So I have one -- I see I do have one on  
7 the 10th by the way?

8           THE CLERK: Yes.

9           THE COURT: Okay.

10          All right. So either Thursday, the 6th, or Friday,  
11 the 7th, or Friday, the 14th, and I would expect that as we  
12 talk now about getting a timing for a response, responsive  
13 pleading, I'll see what we're looking at.

14          Well, let me turn to that first. What's -- on the  
15 defense side, you have the consolidated complaint. You've had  
16 it. What kind of time is it going to take to deal with  
17 responsive pleadings?

18          MR. NICOUD: Your Honor, we've had some discussions  
19 with plaintiffs' counsel, and I believe we have an agreement  
20 that defendants have indicated we would expect to file a  
21 motion or motions, given we have multiple defendants, to  
22 dismiss, and the holiday periods unfortunately are upon us.

23          THE COURT: Yeah.

24          MR. NICOUD: We've talked with plaintiffs, and I  
25 understand that they are agreeable that defendants could make

1 those motions on January 14th.

2 THE COURT: Ah, well, then if you were going to get  
3 such a motion on January 14th, then let's look at the  
4 following week for purposes of a status because we'll see then  
5 what plaintiffs' counsel believes is going to be needed in  
6 terms of time for a response to the motion or motions, so I  
7 will provide then that any defense motions will be made by  
8 January 14th, 2011.

9 And that next week is not so bad. I could actually  
10 do it at a 9:00 o'clock, I think, several of those days, I  
11 believe, although Sandy probably has more than I have listed.

12 THE CLERK: I think an 8:45 would be better.

13 THE COURT: Okay. 8:45 then in the week that begins  
14 with Martin Luther King holiday. So I think I have Tuesday,  
15 the 18th, or Thursday, the 20th, right, Sandy?

16 THE CLERK: Fine.

17 THE COURT: Okay. Either of those. Probably the  
18 20th would be better under the circumstances, okay?

19 So we'll have a status, if that's all right, on  
20 January 20th at 8:45. Okay?

21 I think that covers everything for the day, right?  
22 Thank you all.

23 MR. MILLER: Thank you, Judge.

24 MR. FREED: Thank you, your Honor.

25 MR. NICOUD: Thank you, your Honor.

1 (Which were all the proceedings heard.)  
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5 C E R T I F I C A T E  
6  
7 I certify that the foregoing is a correct  
8 transcript from the record of proceedings in the  
above-entitled matter.  
9 /s/ *Kathleen M. Fennell*    *December 14, 2010*  
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Kathleen M. Fennell  
Official Court Reporter